

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
APPENDIX**



74-1717

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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In the Matter of :

UNITED STATES OF AMERICA ex rel. :  
TIVIS TROIT HAWKINS, II, :

Relator-Appellant, :

-against- :

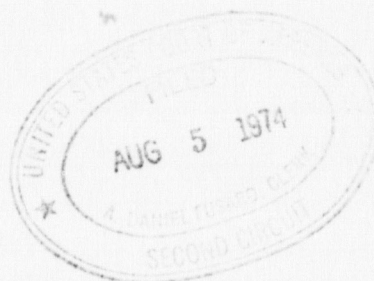
J. EDWIN LAVALLEE, Superintendent, :

Respondent-Appellee. :

: Docket No. 74-1717

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APPELLANT'S APPENDIX



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*Joseph M. Gagliardi, Jr., for People, Direct*

Q. Did you proceed down Route 22? A. Yes, sir.

Q. Please tell us what happened as you were going down Route 22. A. Well, I had to go to the bathroom, so I pulled off on Deans Bridge Road into a little clearing.

Q. Now, do you know this area well? A. Yes, sir.

Q. Had you been born and raised in this area? A. Yes, I have.

Q. And did you know Route 22 and did you know Deans Bridge Road? A. Yes, sir.

Q. And when you say you pulled off Route 22 onto Deans Bridge Road, approximately how far off Route 22 were you when you stopped? A. Quarter of a mile, maybe less. It wasn't far.

Q. It was not far. And did you pull your car into a little clearing area there? A. Yes, sir.

Q. What did you do? A. I stepped out of the car to the rear of it and I urinated.

Q. Did Jeannette Steinke remain in the car? A. Yes, she did.

Q. What did you do then? A. I returned to the car and I pushed the clutch in and reached for the key. I heard someone come to the door and say, "Don't look. Don't move. This is a stickup."

Q. What did you do then? A. I turned and looked.

Q. What were you able to see at that time? A. I saw an automatic pistol, and I saw a colored man wearing sunglasses, dark glasses.

Q. Now, you say you saw an automatic pistol—withdrawn.

When you were in the service, did you handle an automatic? A. I was familiar with a .45.

Q. Do you know the difference between an automatic and a revolver? A. Yes, sir.

Q. And you say this pistol that you saw was an automatic? A. Yes, sir.

*Joseph M. Gagliardi, Jr., for People, Direct*

Q. And then you said he removed your belt? A. Yes, sir.

Q. What did he do with your belt? A. He tied my feet to the pole with it.

Q. Then what happened? A. He went back upstairs.

Q. Now, while this time was going on in the cellar, did you get another look at the man? A. I got a glance at him, that was all.

Q. What happened after you were tied? A. He went upstairs. I didn't hear nothing for a while, just silence. And then he come back downstairs.

Q. Approximately how long was he gone before he came back down? A. Three or four minutes, no more than that.

Q. Did he come back down through the cellar steps? A. Yes, sir.

Q. And what happened as he was coming down the cellar steps? A. I looked over my shoulder and I got another glance at him.

Q. And when he arrived down in the cellar, what happened? A. He placed a plastic bag of some sort over my head. It was just laying on there.

Q. I'm sorry, I didn't hear you. A. It was just hanging on my head.

Q. Was it hanging tightly or loosely? A. Loosely.

Q. Then what happened? A. I was trying to look around to see what was going on, and I couldn't see out straight, so I was looking down, and when I looked down I saw a knife down about here (indicating).

The Court: Indicating in the chest area.

Q. Did you see what kind of a knife it was, Joe? A. It was a wooden handle, steak knife like would be on the table for dinner or something.

Q. And you saw this knife, and then what happened. A. He then cut my throat.

*Roger Fairchild, for People, Direct*

A few seconds after, a male voice was heard asking, "What do you want," again. And I asked if he was Hawkins. He said yes, and I said that I would like to speak with him.

Q. What happened? A. I then went around the corner to the left side of the building where there was a stairway leading up to a door. I proceeded up the stairway, and at the top as I reached the top, the door opened, and a man was standing there. And I asked him if his name was Hawkins, and he replied yes.

Q. Do you see that man in court here this morning?  
A. Yes, sir.

Q. Will you point him out, please? A. (Witness indicates.)

Mr. Facelle: May we have the record indicate, Your Honor, that Investigator Fairchild has identified the defendant?

Q. At the time that you observed him, Investigator, what was he wearing? A. He was wearing dark trousers, no shoes, no socks, no shirt, and dark prescription sunglasses.

Q. What happened then? Did you have any further conversation with the defendant? A. He stated—after he replied to me his name was Hawkins, I advised him he was under arrest for murder.

Q. What did you do then? A. We then went down the stairs to where the car was. He was placed against the car, searched, and handcuffed.

Q. What did you do then? A. At that time Investigator LaMontagne arrived at the scene, and another uniformed trooper. I don't recall his name. I left the defendant in custody of him, and the two troopers, and I proceeded back up the hill to the other house.

Q. What did you do when you arrived up the hill? A. I advised Investigator Conover that I had arrested the subject, and he returned to the scene with me.

*Tivis Troit Hawkins, II, Defendant, Cross*

Q. Now, your wife woke you up. What did you do?

A. She said troopers were outside. I got up. I asked what did they want. He said for me to come outside.

Q. You are going to have to keep your voice up, please. What was your last answer?

Mr. Facelle: May we have it read back?

The Court: Read the answer, please.

(The witness' last answer was read back.)

Q. Did you look out the window? A. I looked out the window.

Q. You saw a troop car? A. Yes, sir.

Q. Did you see a man in uniform? A. Yes, sir.

Q. And what happened when you left the house? A. I went out. He asked me my name. I told him. He handcuffed me. They threw me against the car, they searched me. I asked what this was all about. They didn't say anything.

Q. At this time, when you were sleeping in bed, what were you wearing? A. I sleep nude.

Q. You had nothing on. When your wife called you, what did you put on? A. I put on a pair of pants.

Q. When you were outside, you were being searched, that is all you had on, is that correct? A. Yes, sir.

Q. Now, when the trooper put the handcuffs on you, did you ask him any questions? A. I asked him what it was all about. "What are you putting handcuffs on me for?"

Q. What did he say? A. He didn't say anything.

Q. Absolutely nothing at all? A. Absolutely nothing.

Q. Did you ask the question again? A. I asked the question again. They wanted to know where the gun was and the other man that lived there.

Q. And the other— A. The other man that lived there.

*Tivis Troit Hawkins, II, Defendant, Direct*

Q. Now, what did he do when you say he grabbed and started choking you? What did he do actually? A. He grabbed me by the throat.

Q. Go ahead. A. And then one of the other officers—the room was—it was about—But I can't be sure. But it was more than four in there. And one came in with a long stick, a billy club, I imagine.

Mr. Facelle: May we have the record indicate the size of this billy club?

Q. Will you show us? A. A standard size billy club.

The Court: How long? About fifteen inches. Indicating about fifteen inches.

Q. Go ahead, please. A. I kept insisting that I didn't know what they were talking about. I kept—

Q. Will you speak up, please? Try to keep your voice up as loud as you can? A. I kept insisting that I did not know what they were talking about. Whereupon one of them suggested, "Let's take him downstairs." So they took me downstairs and there was a chair by a support beam. It's made of metal. And they had a light with a—more or less like a light you use in photography. And they placed me in the chair. And they started out again. And I kept insisting that I didn't know what they were talking about. And he punched me side the head, and I fell over. And I got up, you know. They started beating on me.

Q. Will you speak up? A. When I sat back in the chair, they started at me again, and I fell over again, kicking me. Well, in other words, they beat me. And then the only way I could seem to get them off me was to, I said, "Well, whatever you say, I did it. Just stop beating me." And they never once mentioned anything about my having a lawyer, my calling a lawyer or advised me of my rights.

*Tivis Troit Hawkins, II, Defendant, Cross*

Q. Did you ask them? A. No, sir. At that point I was too afraid to say anything or do anything.

Q. You didn't even ask them what they wanted you to confess to or what you supposedly did? A. No, sir.

Q. Now, what is the next thing that happened? A. I can't put things in their proper places.

Q. Well, tell us the next thing that you remember. A. I can give it to you, but it will be jumbled. Someone kept mashing on my feet. I was taken downstairs into the cellar—

Q. Someone kept mashing on your feet? A. That's right.

Q. You had no shoes on? A. No, sir.

Q. And how were they mashing on your feet? A. With the toes of their foot, with the toes of their shoes.

Q. Do you know who it was that was mashing on your foot? A. No, I couldn't point the finger at no particular individual.

Q. Was it Simbari or another trooper, now? A. Whoever was in the room. It was more than four.

Q. Well, Simbari, you remember as choking you. Was it Simbari, who was the one who choked you— A. That's why I remember him.

Q. I haven't finished my question. Was it Simbari who was also mashing your feet? A. I don't know who was mashing my feet.

Q. And what else do you remember now in this room? A. Later I was taken in the basement.

Q. Do you remember anything else that happened in that room? A. No, sir.

Q. And how long were you in the room before you were taken to the basement? A. It seemed as if I was there forever.

Q. Can we narrow it down from forever down to something certainly like a matter of minutes or hours? A. I can't say.

*Dr. Milton Ivker, for People, Direct*

Q. What part of the back wall was cut? A. Part of the back wall was also severed.

Q. Continue please. A. To all intents and purposes, the major vessels on the left side was also visualized, but it was not as exposed as the vessels on the right. He had additional laceration of the angle of his left lip and another laceration on the left side of the back of his head.

Q. Now, could you—I believe, Doctor, you said that the wound started at the right or left. The wound extended let's say. A. Yes.

Q. From the right side of the neck clear over to the left side of the neck, is that correct? A. Yes.

Q. Do you know, sir, or do you recall approximately how long the wound extended, if you recall, sir? If not—A. I should have it here somewhere.

The Court: Take your time.

The Witness: I don't have it on my record here. But I believe it was, as I said, about seven centimeters. This would be about two and a half, about four inches, three and a half to four inches.

Q. That is just your best recollection now, is that correct? A. I have a picture of this. And I think you could visualize this best for yourself if you saw the picture of it. And I wouldn't have to resort to doing this.

Q. All right. Now, Doctor, you recall, you say—Withdrawn. You performed the surgery on the patient? A. Yes, sir.

Q. And can you tell us, Doctor, approximately how long you performed surgery on Joseph Gagliardi just for the neck injury? A. About five and a half hours.

Q. And would you tell us briefly, Doctor, the nature of the surgery? A. What we had to do first was put an endotracheal tube, e-n-d-o-t-r-a-c-h-e-a-l, tube through his windpipe. Once this was put in place, and this is

*Eugene Curico, for People, Direct*

Q. Was the defendant to your knowledge or personal knowledge under arrest at that time? A. Yes, sir.

Q. Was he handcuffed? A. Yes, sir.

Q. Now, you say he was brought into this B. C. I. Office, is that correct? A. Yes, sir.

Q. And did you talk to the defendant at that time? A. Yes, sir.

Q. Now, who was in the room at the time that you spoke to him? A. Investigator Roger Fairchild.

Q. And yourself and the defendant? A. Yes, sir.

Q. Anyone else? A. No, sir.

Q. And to the best of your recollection where was the defendant seated? A. Alongside of one of the desks.

Q. Now, tell us as best as you recall, Investigator, what you said to the defendant and what he said to you? A. Upon being brought into the room I identified myself, "I am Investigator Fairchild," as investigators and members of the State Police. I told him that he was under arrest for the crime of murder, and that I was going to question him concerning this crime. I told him that he was entitled to have a lawyer and that we would call a lawyer for him if he wanted one, and if he couldn't afford to pay for a lawyer he could have a lawyer at no cost. I told him that if he answered any of these questions, whatever he might say would be used against him in a criminal action concerning the crime of murder and any other related crimes.

Q. Did you ask him or advise him as to whether or not he had a right not to make any statement whatsoever? A. I informed him that he had a right to say nothing or have an attorney present. He stated that he didn't do anything wrong. He didn't need a lawyer.

Q. Did you ask him any other questions? A. Well, I proceeded with the interview at this particular point asking him to identify himself, to give his address, his employment, his age.

*John Simbari, for People, Direct*

Q. Now, will you tell us please to the best of your recollection what you said to the defendant and what he said to you? A. Well, when I eventually walked into the office I approached the defendant and identified myself to him. And—

Q. When you say you identified yourself, what did you say to him? A. I told him I was John Simbari and I was an investigator with the State Police. And I asked him if he was Tivis Hawkins, which he apprised me affirmative. I then told him I was going to question him about this incident that he was arrested for. Was he aware of what he had been arrested for. He said "Yes. I'm supposed to have killed some girl," or something. So I advised him that he didn't have to tell me anything, and if he did tell me something it could be used in a criminal action against him. I advised him that he could contact an attorney, that if he could not afford an attorney that the court would appoint one for him, that he could have an attorney present during the course of the interview at any time.

Q. What did he say to you? A. He said "I know all that."

Q. Now, what further did you say to him and what further did he say to you? A. Well, I started to question him about this incident. And he replied that he would tell me—if he told me what I wanted to know could he see his wife. I says "Yes." Well, "But you can see your wife even if you don't tell me what I want to know." And he proceeded to tell me what occurred that morning.

Q. Now, at this point were the handcuffs still on the defendant? A. No. I had Miceli remove the handcuffs from him.

Q. Now, you said he proceeded to tell you what happened on that particular morning? A. Right.

*Tivis Troit Hawkins, II, Defendant, Cross*

Mr. Facelle: They never what?

The Witness: They never once advised me of my rights. They wouldn't let me make a phone call. They wouldn't let me do anything. They said they wanted the confession first.

Q. And did you then sign the confession? A. They took me back upstairs. And the same guy, that was the last one on the stand yesterday, he sat there with a pencil. I think it was him. I know he was doing the talking. He said, "You did it like this." I said "Yes." "You did it like this." "Yeah." "You did it like this." "Yes." And it went on like that until they completed it. So that's it. I think then I saw my wife. I can't be certain. I think my wife was outside then; outside or in the room. I can't remember. But anyway, they called for—I guess it was a notary public. He was dressed in grey work pants and a grey work shirt. And the same trooper—I don't know his name—he said, "If you don't sign it when he comes, we're going to push you out the side door and shoot you in the head and say you tried to escape." He said, "Don't read it. Just when he come in, sign it." There was about five. There was quite a few copies.

Q. Do you know how many papers you signed? A. No, I don't.

Mr. Rosenberger: I have no further questions of Mr. Hawkins, Your Honor.

*Cross Examination by Mr. Facelle:*

Q. What time did you arrive at the police station, Mr. Hawkins? A. I haven't the slightest idea. I didn't have anything on but a pair of pants.

Q. Can you give us an approximation? A. I haven't the slightest idea. All that I know, that it was daytime.

*Tivis Troit Hawkins, II, Defendant, Cross*

Q. And you don't recall or is it your testimony now that you don't recall him asking you any questions? A. I remember the second guy on the stand. He is the one that first started out asking me personal questions.

Q. But you don't recall the first man, Investigator Curico? A. No, I do not.

Q. Asking you any questions? A. No, I do not.

Q. And you don't recall whether or not he may have advised you of your rights? A. He did not. Not only he, no one else did.

Q. But you don't recall talking to him? A. I do not recall talking to him. He made a statement after that statement was wrote up.

Q. He what? A. He made a statement after the statement was wrote up and signed.

Q. Yeah. A. He made a statement.

Q. What do you mean, he made a statement? A. He said that "this is no good."

Q. He said what? A. He read it; and he said, the statement, he said "This is no good."

Q. Who was he talking to? A. He was talking to one of the other officers.

Q. In your presence? A. In my presence. They made quite a few comments in my presence.

Q. Now, this statement that he was referring to, was it both statements or one of the statements? A. He read the white one.

Q. The typewritten one? A. The typewritten one.

Q. And he said it was no good? A. That's what he said.

Q. Did he say why it was no good? A. If he did, I didn't hear him. He read it. He said, "This is no good." And he slapped it down.

Q. Who did he say that to? A. To one of the officers in the room.

*Tivis Troit Hawkins, II, Defendant, Direct*

Q. And were you questioned by anyone there? A. I was.

Q. Would you tell us, please, what happened in that police station? A. Do you mean upon my arrival?

Q. Your questioning in that police station. A. Well, they started out with asking me my name, where I was from, and where I lived, who I worked for, my age, and my education, all that sort of stuff. And they asked me did I drink, and did I take drugs.

Q. And were you asked any questions about the crime with which you are now charged? A. Yes, I was.

Q. And would you tell us the circumstances in which you were asked those questions? Tell us what happened? A. To begin with?

Q. In the police station. A. Yes. To begin with, this one trooper, he was on the stand.

Mr. Facelle: If Your Honor please, I'm going to ask that the witness please keep his voice up. It's very difficult to hear him.

Mr. Rosenberger: Speak up louder.

The Court: Just speak up a little louder, Mr. Hawkins.

Q. Would you talk to me over here? A. To begin with, this trooper that, the last one that was on the stand yesterday, he started out, "You did it."

Q. Is that Mr.— A. I don't know his name.

Q. —Mr. Simbari? A. I don't know his name. The second one that was on the stand.

Q. The second police officer? A. Yes. He started out with "You did it. And we're going to get a confession one way or the other. Which way will it be?" And I replied, "I don't know what you're talking about." Then he grabbed me and started choking me. I was handcuffed.

Q. You were handcuffed? A. Yes.

*Tivis Troit Hawkins, II, Defendant, Cross*

Q. Do you know how they got to be hurting? A. They were stepping on them deliberately when I was upstairs.

Q. When you were upstairs before you came downstairs? A. That's right. They were stepping on them up there.

Q. Let's stay upstairs now. While you were upstairs, so in addition to the choking they were stepping on your feet? A. Simbari, he stepped on my foot. This was after I was choked.

Q. I see. Now, did he step on your foot with his heel? A. With the toe of his shoes.

Q. You know what I mean by stomping, don't you? A. He didn't stomp. He put his foot on and mashed.

Q. He put his foot on and mashed down? A. That's right.

Q. Was it your right foot or left foot? A. Both feet.

Q. Both feet? A. And he wasn't the only one.

Q. And the other men did it? A. Someone else stepped on my other foot.

Q. Someone else got what? A. Someone else stepped on one of my feet.

Q. And did he mash it also? A. He mashed in also. No one stomped my foot.

Q. And this happened before you came downstairs? A. This happened before I came downstairs. When I was going downstairs, they were deliberately stepping on my feet. They stopped me, stepped on my feet and carried me on.

Q. Now, where else did it hurt? A. I was hurting all over or it seemed like it to me.

Q. Please tell us where? A. All over.

Q. Try again now. Were you kicked, you say, in the lower part of your back? A. Correct.

Q. Where else were you kicked? A. I cannot truthfully say. I can truthfully say that I was hurting all over.

*Tivis Troit Hawkins, II, Defendant, Cross*

Q. You printed it on all your papers when you went up to the jail? A. That's correct.

Q. And you printed your name on almost every other paper? A. Except for some papers what he brought.

Q. What was the purpose of that? A. I was being wronged, so I wouldn't sign my name.

Q. I see. A. And they had no knowledge as to whether I could print or write. All they wanted was a signature.

Q. So you had no presence of mind, Mr. Hawkins, that you were not going to sign your name. You were going to print it? A. I had no other alternative. He said if I did not sign when the man came, I was going to be pushed out of the side door and shot in the head. And it would be said that I was trying to escape. Rather than have that happen, I signed my name.

Q. Let's go back to the questions he asked you. By the way, up to this point now, did you say that you wanted a lawyer? A. I beg your pardon?

Q. Did you tell him I want a lawyer? A. Did I tell him what?

Q. At this point, up to this point when he started to ask you questions, you still didn't know what you were being charged with and nobody would tell you. Did you tell him I want a lawyer? A. I asked for a lawyer. I wanted to call my wife. They said, "Nothing is going to be done until we get this confession."

Q. So up until this point you had asked for a lawyer? A. I asked for a lawyer.

Q. And you had asked to call your wife? A. And I asked to call my wife.

Q. And nobody would tell you what you were charged with? A. They did not tell me anything. I remember—The only thing that I know, as far as I was charged with, was when he said, "You did it like this and you did it like that." And then again when I went to be arraigned.

*John Simbari, for People, Direct*

Q. Now, will you tell us please to the best of your recollection what you said to the defendant and what he said to you? A. Well, when I eventually walked into the office I approached the defendant and identified myself to him. And—

Q. When you say you identified yourself, what did you say to him? A. I told him I was John Simbari and I was an investigator with the State Police. And I asked him if he was Tivis Hawkins, which he apprised me affirmative. I then told him I was going to question him about this incident that he was arrested for. Was he aware of what he had been arrested for. He said "Yes. I'm supposed to have killed some girl," or something. So I advised him that he didn't have to tell me anything, and if he did tell me something it could be used in a criminal action against him. I advised him that he could contact an attorney, that if he could not afford an attorney that the court would appoint one for him, that he could have an attorney present during the course of the interview at any time.

Q. What did he say to you? A. He said "I know all that."

Q. Now, what further did you say to him and what further did he say to you? A. Well, I started to question him about this incident. And he replied that he would tell me—if he told me what I wanted to know could he see his wife. I says "Yes." Well, "But you can see your wife even if you don't tell me what I want to know." And he proceeded to tell me what occurred that morning.

Q. Now, at this point were the handcuffs still on the defendant? A. No. I had Miceli remove the handcuffs from him.

Q. Now, you said he proceeded to tell you what happened on that particular morning? A. Right.

*John Simbari, for People, Direct*

Q. Was what he told you reduced to writing? A. Yes, it was.

Q. In what manner? A. Well, it was reduced to a handwritten statement which Investigator Miceli took down, and then it was typed down later on.

Q. Now, who did the actual writing, this handwritten statement? A. Investigator Miceli.

Q. And what the defendant told you was written down by Investigator Miceli, is that correct? A. Yes, it was, right.

Q. And after Investigator Miceli had written it down, what did you do with that particular statement as applies to the defendant? A. Investigator Miceli handed me the statement and I read the statement to the defendant.

Q. You read it to him? A. Yes.

Q. In its entirety? A. Right.

Q. Then what happened? A. Then I asked the defendant if he would sign it, which he replied to the affirmative. And he signed it.

Q. And he signed it? A. Right.

Mr. Facelle: May we have these two pages of legal sized paper marked for identification, Your Honor?

The Court: Let it be marked People's 1 for identification.

(People's Exhibit 1 was marked for identification by the Court Reporter.)

Q. Investigator Simbari, would you look at People's A for identification?

The Court: People's 1.

Mr. Facelle: People's 1. I'm sorry.

Q. People's 1 for identification. And I ask you if that is the handwritten statement to which you have just testified? A. Yes. This is the statement.

*John Simbari, for People, Direct*

Q. All right. Now, after that statement was concluded, what if anything happened? This particular statement was concluded. A. Well, after I finished reading it to him I asked him if he would sign it, to which he agreed.

Q. And did he sign it? A. Yes, he did.

Q. And then what happened? A. And then I took the statement and I started to type it out.

Q. You personally then started to type it, is that correct? A. Yes.

Q. And thereupon did you type the statement? A. Yes, I did.

Q. And the statement that you typed was the defendant present? A. Yes, he was.

Q. And were you reading it out loud as you were typing it? A. Yes. I was reading off this yellow page and then inquiring to the defendant about certain things in the statement.

Q. That is the typewritten statement is the exact same as the statement on these yellow pages? A. No. There were a few changes made in the typewritten statement at the request of the defendant.

Q. When you concluded this typewritten statement which you personally typed, what happened then? A. I gave it to the defendant and asked him if he would read it out loud.

Q. Did he read it out loud? A. Yes, he did.

Q. And after he read it out loud, what happened then? A. Well, we sent for a notary public. And when the notary came in he came into the room where the defendant was and asked him if this was his statement and had he given it voluntarily and would swear to it. And the defendant swore to it. And it was notarized.

Q. Did the defendant sign it? A. Yes, sir.

Q. And his signature was acknowledged by a notary, is that correct? A. Yes, it was.

*John Simbari, for People, Direct*

Mr. Facelle: May we have this marked People's 2 for identification?

The Court: Yes. Let it be marked.

(People's Exhibit 2 was marked for identification by the Court Reporter.)

Q. I refer you to People's 2 for identification, Investigator Simbari. Is that the typewritten statement to which you have just testified? A. Yes, it is.

Q. Now, to the best of your recollection, Investigator Simbari, approximately what time did you first talk to the defendant? A. Oh, I would say it was somewhere around four-ten and four-fifteen.

Q. And at approximately what time was it when you started to—Withdrawn—when you completed typing that statement and it was signed to the best of your recollection? A. I'd say somewhere around five-thirty, five-thirty-five. Somewhere in that vicinity.

Q. Fine. Now, Investigator Simbari, at any time did you ever threaten or force or strike or abuse this defendant in any manner, way, shape or form to induce him to make this statement? A. No, I did not.

Q. Did you make any promises to him? A. No, I did not.

Q. Did Investigator Miceli or anyone in your presence threaten, strike, or force or abuse this defendant in any way, shape or form? A. No. I didn't see anybody abuse him.

Q. Did you at any time or anyone in your presence at any time ever raise their voice or shout or use other than normal conversation and tones in talking to this defendant? A. No.

Mr. Facelle: I have no further questions. Excuse me. One more question, Your Honor.

The Court: All right.

*Tivis Troit Hawkins, II, Defendant, Cross*

Q. And you never had it read to you? A. It was never read to me.

Q. How about People's Exhibit 2, the typewritten statement? Was that ever read to you? A. It was never read to me. And I never read it myself.

Q. Now, when did you find out for the first time that you were being charged with killing a woman and cutting another man's throat? A. When he started with you did it like this, you did it like that.

Q. That's the very first time you found out? A. That's when I first knew about it.

Q. And as you say, you knew about it when he said you did it like this and you did it like that. Did you question him at this point? A. I didn't question him about anything.

Q. You didn't say at this point you're accusing me of killing somebody? A. The way I felt, I thought they were going to kill me.

Q. I see. So you were ready to confess to anything, is that correct? A. What would you do if you were in a town filled with Negroes and they had you in a room with guns? What would you do?

The Court: Mr. Hawkins, just answer the question.

The Witness: What was the question?

The Court: Read the question.

(The previous question by Mr. Facelle was read back by the Court Reporter.)

The Witness: I would have said anything to keep those people away from me.

Q. And you knew before you signed this paper that this paper in some form or fashion was a confession on your part to having cut a man and having killed a woman? A. I don't know what was on the paper. I never read it and it was never read to me.

*Ralph R. Church, for People, Direct*

Q. Is that your best recollection, sir? A. Yes.

Q. Now, when you went in to notarize a statement, was the defendant dressed in these trousers that you described? A. Yes.

Q. And when you went in to notarize the statement, what transpired? A. Mr. Simbari introduced me to him, and I told him to raise his hand. He had handcuffs on, and they unlocked them. I told him—I said, “Is this statement true?”

Q. Was the statement signed at this point? A. No. He signed it in front of me.

Q. Was the statement signed in front of you in your presence? A. Yes.

Q. All right. And after it was signed, what was done? A. I notarized the four copies of it, and then I left.

Q. Did you ask any questions of the defendant before you notarized the statement? A. Yes, I asked him if the statement was true and his signature, and he said yes.

Q. And then you notarized it? A. Yes.

Q. I show you People’s Exhibit 61 in evidence, and I ask you, sir, if that is your signature and your notary stamp. A. Yes, it is.

Q. Is that the statement to which you have just testified? A. Yes, it is.

Q. Now, sir, at the time that you observed the defendant, and at any time that you were in his presence, did he make any complaints or statements to you of having been beaten or abused in any way? A. No.

Q. At any time, sir, when you observed the defendant, did you observe any marks of any bruises or any signs of any type of beating or abuse? A. Not at all.

Mr. Facelle: I have no further questions.

*Frank A. Conover, for People, Direct*

Mr. Rosenberger: If Your Honor please, I don't know whether that's a question or statement.

Mr. Facelle: Let's see if the witness does.

The Court: Is that an objection?

Mr. Rosenberger: It is.

The Court: The objection is sustained.

Q. Did you want to advise the Defendant—not want to. Withdrawn. Did you advise the Defendant fully and completely as best as you knew how and could as to his rights involving this crime and he personally as a Defendant? A. I advised him to the best of my ability.

Q. And fully and completely to the best of your ability?

The Court: He has answered the question. He has answered that question.

Mr. Facelle: I have no further questions.

Mr. Rosenberger: I have nothing further.

The Court: All right. You had better get going fast.

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(White Plains, New York March 21, 1968).

(The Hearing continued).

FRANK A. CONOVER, New York State Police, Goldens Bridge, New York, called as a witness on behalf of the People, being first duly sworn by the Court Clerk, testified as follows:

*Direct Examination by Mr. Facelle:*

Q. Now, Investigator Conover—

Mr. Facelle: I didn't notice whether or not the investigator was readministered the oath.

The Court: Yes. This is a separate and distinct Hearing. He has been sworn.

*Frank A. Conover, for People, Direct*

Mr. Facelle: I didn't know whether or not it was necessary.

Q. Investigator Conover, on the 17th of July, 1967 did you have occasion to meet an attorney by the name of Edward Blum? A. Yes, sir.

Q. Of Katonah, New York? A. Yes, sir.

Q. And can you tell us please, sir, at approximately what time you met him and where? A. I met Mr. Blum at approximately six-thirty p. m. on the 17th of July, '67 at the Goldens Bridge State Police Station.

Q. And did you have a conversation with him at that time? A. I did, sir.

Q. And did he at that time, sir, identify himself to you as an attorney? A. He did.

Q. And did he at that time, sir, state to you that he was there on behalf and representing the defendant Tivis Troit Hawkins? A. Yes, sir, he did.

Q. Will you tell us please further what conversation you had with Mr. Blum at that time? A. Mr. Blum—

Q. Just a moment please.

The Court: It's all right.

Mr. Facelle: Withdrawn.

Q. Was the defendant Tivis Troit Hawkins in custody at that time? A. Yes, sir. He was.

Q. Now, will you tell us please, sir, what further conversation you had with Blum in Goldens Bridge? A. (No response.)

Q. Investigator Conover, will you tell us please, sir, briefly what issue of conversation you had with Mr. Blum at that time? A. Mr. Blum approached me, identified himself as an attorney, his name. I identified myself as an investigator with the State Police. And Mr. Blum asked me what the charges were against Mr. Hawkins. And I told him that he was being held for the charge of murder first degree.

*Frank A. Conover, for People, Direct*

Q. Did he at that time request to see the defendant? A. Yes, sir.

Q. Or request information as to where the defendant was? A. Yes, sir. He did.

Q. Will you tell us please briefly what that conversation was? A. Mr. Blum requested to see Mr. Hawkins and as to where he was. And I advised Mr. Blum that Mr. Hawkins was being processed in the adjoining room; processed, meaning fingerprinting. And I checked in the B. C. I. Office where the processing was going on, and returned to Mr. Blum and told him that it would be a few minutes until the completion of this process.

Q. At that time had Mr. Blum followed you in the direction of the B. C. I. Office or did he remain by the main desk? A. He remained by the main desk.

Q. Now, did you have any further conversation with Mr. Blum at that time? A. Not at that time, sir, no.

Q. And did there come a time when you did have further conversation with him? A. Yes, sir, there was.

Q. Will you please tell us, sir, approximately how long thereafter this initial conversation and what the substance was? A. Approximately twenty minutes later after Mr. Blum had time to confer with Mr. Hawkins he exited from the B. C. I. Office—

Q. Well, just one moment now. You seem to have—Withdrawn. Did there come a time when he did go into see the defendant? A. Yes, sir.

Q. And approximately how long was it after this conversation that you had with him in which he requested to see him? A. Approximately fifteen minutes after he arrived and I first spoke to him that he again accessed to the room.

Q. Did you escort him in? A. Yes, sir.

Q. So you had an additional conversation with him at that time, is that correct? A. Yes, sir.

Q. And was it you that brought him into the B. C. I. Room? A. Yes, sir, it was.

*Frank A. Conover, for People, Direct*

Q. And who was in the office at that time? A. Investigator Simbari was fingerprinting Mr. Hawkins. Investigator LaMontagne.

Q. And you brought Mr. Blum to the office and then you left, is that correct? A. Yes, sir.

Q. Did you see the defendant conferring with Mr. Blum at that time? A. Yes, sir.

Q. And to the best of your recollection, sir, how long did the defendant confer with his attorney? A. Approximately fifteen minutes.

Q. And did you have a conversation then with Mr. Blum at the expiration of this conference between counsel and defendant? A. Yes, sir. Upon the completion of their conversation Mr. Blum came out of the B. C. J. Office and he approached me and asked me what the schedule was for the evening. I advised him that we were going to take Mr. Hawkins down to the hospital to be viewed by the victim Joseph Gagliardi. And then in the proximity of eight o'clock, that he was to be arraigned in the Town Hall in North Salem.

Q. Did you have a further conversation at that time? A. At that time—Excuse me, sir. At that time Mr. Blum requested directions on how to get to the Town Hall, North Salem. And I gave him the directions.

Q. Did you have any further conversation with him at that time? A. No, sir.

Q. Now, sir, you testified that at this time you told Mr. Blum that you were taking the defendant to the hospital to be viewed by the victim Joseph Gagliardi, is that correct? A. Yes, sir.

Q. Did you tell him what hospital, sir? A. Yes, sir, I did.

Q. What hospital did you tell him? A. The Northern Westchester Hospital in Mount Kisco.

Q. And at that time was the defendant still dressed in just his trousers? A. Yes, sir, he was.

*Frank A. Conover, for People, Cross*

Q. And there came a time, sir, when the defendant did seek and did obtain a full set of clothes, is that correct?

A. Yes, sir, there was.

Q. And he was dressed? A. Yes, sir.

Q. And he was taken to the hospital? A. Yes, sir, he was.

Q. Approximately how long after his conversation with Mr. Blum when you told him that you were taking him to the hospital and the time of your departure? Approximately how much time elapsed? A. It was approximately fifteen minutes.

Mr. Facelle: I have no further questions.

The Court: You may inquire, Mr. Rosenberger.

*Cross Examination by Mr. Rosenberger:*

Q. Mr. Conover, did you make any notes that evening?

A. Did I make any notes, sir?

Q. Yes, sir. A. No, sir.

Q. None at all? A. None at all.

Q. And you had conversations with many people that evening? A. Oh yes, yes, sir.

Q. Yet you remember quite distinctly that you told Mr. Blum that you were going to the hospital? A. Yes, sir, I do.

Q. And when did Mr. Hawkins ask for his clothes?

A. Mr. Hawkins asked for his clothes just prior to his interview with Mr. Blum.

Q. And when did these clothes arrive? A. I believe Mrs. Hawkins left during the time that Mr. Blum was speaking to Mr. Hawkins. And she proceeded to her home with Mrs. Haussermann, and they brought the clothes back.

Q. Now, did Mr. Hawkins ask you for his clothes? A. Not myself, no, sir.

Q. Now, sir, at that point had you—Withdrawn.

*Robert LaMontagne, for People, Direct*

Q. Is that the same courthouse? A. No, sir.

Q. Different jurisdictions, are they not? A. Yes, sir.

Mr. Facelle: I have no further questions.

The Court: 1968, did you say?

The Witness: Yes, sir.

*Re-cross Examination by Mr. Rosenberger:*

Q. Are those contiguous jurisdictions? A. Yes. They are bordered jurisdictions.

Q. And Mr. Blum's office is in Katonah? A. Yes, sir.

Mr. Rosenberger: No further questions.

Mr. Facelle: Investigator LaMontagne.

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ROBERT LAMONTAGNE, New York State Police, Brewster, New York, called as a witness on behalf of the People, being first duly sworn by the Court Clerk, testified as follows:

*Direct Examination by Mr. Facelle:*

Q. Now, sir, you are employed by the New York State Police, is that correct? A. Yes, sir.

Q. As a police officer? A. Yes, sir.

Q. How long have you been so employed? A. It will be seven years in June of '68.

Q. And what is your present assignment or position within the New York State Police? A. Investigator in the Bureau of Criminal Investigation.

Q. And how long have you been an investigator with the B. C. I.? A. It will be three years in May of '68.

Q. Now, sir, were you serving in that official position as investigator in the B. C. I. of the New York State Police on the 17th of July, 1967? A. Yes, sir.

*Robert LaMontagne, for People, Direct*

Q. And on that date, sir, did you have occasion to meet and converse with a Mr. Edward Blum? A. Yes.

Q. Will you please tell us, sir, where and at approximately what time? A. It was at approximately six-thirty p.m. on July 17th at the B. C. I. Office at the Goldens Bridge Station, Goldens Bridge, New York.

Q. And will you please tell us the circumstances under which you met and conversed with Mr. Blum? A. Yes. I was present in the B. C. I. Office with Investigator Simbari and the defendant in this case who was being fingerprinted by Investigator Simbari. I was standing at the door mainly for security reasons, and a man came up to me and identified himself as an attorney for the defendant. His name was Mr. Blum. And he presented me a white card showing me his identification. He asked me if he could see the defendant. I stated to him yes he could, but we were in the process of fingerprint. And we had to photograph him and take him to Northern Westchester Hospital to see a victim.

Q. Did you have any other conversation with him at that time? A. No.

Q. How long was it before he entered the room and did converse with the defendant? A. Well, he left the room when he first approached. He wanted to see the defendant when I told him it would be a while yet. He then went into one of the offices and waited until we were through with him.

Q. Approximately how long was that, sir, if you recall? A. Approximately ten minutes.

Q. And then there came a time when he was permitted to converse with the defendant? A. Yes, there was.

Q. Were you present when this conference took place? A. Yes. I saw him sit down on the chair. We had three chairs in the office. I saw him sit down next to the defendant and talk to him.

Q. Did you have any further conversation with Mr. Blum at that time? A. No, sir.

*Robert LaMontagne, for People, Cross*

Q. Did you have any further conversation with him with reference to taking the defendant to Northern Westchester Hospital? A. No. That was the only conversation I had, was the original one.

Mr. Facelle: No further questions.

*Cross Examination by Mr. Rosenberger:*

Q. Mr. LaMontagne, when you met Mr. Blum did you see Mr. Conover? A. No, I didn't, sir.

Q. Did you see Mr. Conover in the room? A. I believe. Not in the B. C. I. Office. He possibly was in the other office. In fact he was at the scene. But not when he entered, when Mr. Blum entered the room.

Q. You say that you saw Mr. Blum at about six-thirty? A. Yes, sir.

Q. And at six-thirty you were standing where, in the door of the B. C. I. Room? A. Yes. It was open to the other room also. The door was open.

Q. The door which leads from the larger room to the B. C. I. Room? A. Yes, sir.

Q. Were you standing in that doorway? A. Yes, right alongside of it.

Q. Which way were you facing? A. Sideways. It would be south. I would be facing south.

Q. It would be as between the two rooms. Which way would you be facing? A. If you would come into the room from the other office, I would be on the left hand side right at the entrance. There was like a desk there.

Q. You were facing into one room or the other? A. I was facing so I could view the door and the defendant.

Q. So were you—I see. Now, did you see where Mr. Blum came from? A. He just disappeared at the door—just appeared at the door. He had to come from the reception office. There is only two offices, and he just appeared at the door.

Q. Is there a front door? A. Yes.

*John Simbari, for People, Direct*

lot. From the knowledge of the persons working on the case and a few of the other people that come up, I would say at least approximately fifteen.

Q. And people coming in and out constantly? A. Yes.

Mr. Facelle: I have no further questions.

Mr. Rosenberger: I have nothing further.

The Court: You may step down.

Mr. Facelle: Investigator John Simbari.

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JOHN SIMBARI, New York State Police, Henrietta, New York, called as a witness on behalf of the People, being first duly sworn by the Court Clerk, testified as follows:

*Direct Examination by Mr. Facelle:*

Mr. Facelle: With the court's permission, perhaps we can expedite this since Investigator Simbari has testified only yesterday.

Q. You are with the State Police twelve years as police officer, is that correct? A. That's correct.

Q. And that you have been in the B. C. I. as investigator for approximately six years? A. That's correct.

Q. And you were serving as an investigator on the 17th day of July, 1967, is that correct? A. That's correct.

Q. Now, on the 17th of July, 1967, Investigator, did you have occasion to meet and converse with an Edward Blum? A. Well, I saw Mr. Blum at the barracks at about six-thirty while I was fingerprinting the defendant.

Q. And where did that fingerprinting take place? A. In the B. C. I. Office.

Q. Did Mr. Blum enter the office at that time? A. No, he did not.

*John Simbari, for People, Direct*

Q. Did you have any conversation with him at that time? A. No, I did not.

Q. Who else was in the office with you and the defendant at that time? A. Investigator LaMontagne.

Q. Anyone else? A. Not to my knowledge, no.

Q. Did you see or notice whether or not Investigator Conover may have been with Mr. Blum at the time that he appeared at the door? A. I don't know.

Q. Now, did there come a time when Mr. Blum entered the office? A. Yes, there did.

Q. Approximately what time if you recall? A. Oh, I'd say around six-forty-five.

Q. And did he converse with the defendant at that time? A. Yes, he did.

Q. In your presence? A. Yes, he did.

Q. And at that time did you have any conversation with Mr. Blum before he conversed with the defendant? A. Mr. Blum wanted to know if it was all right if the defendant's wife would go and get him a change of clothes. I said sure.

Q. That's the only conversation you had with Mr. Blum at that time? A. Right.

Q. Did you have any conversation with him subsequent to his conference with the defendant? A. No.

Q. All right. Did you talk to him at all later that— A. Yes, I did.

Q. At approximately what time and where? A. Well, it was shortly after the conversation that Mr. Blum had with the defendant. We took him upstairs so he could change his clothes. And as I was walking into the main office Mr. Blum came up to me and asked me if it would be all right if they got him some sandwiches. I said sure, but there is no restaurants around here. The nearest restaurant place you can get a sandwich is in Katonah. I said we're going to take Tivis down to the hospital in Mount Kisco. We have to have the victim down there to take a look at him, and we will be back. If we weren't

*John Simbari, for People, Cross*

at the station, we would be at the Town Hall in North Salem.

Q. And at this time you say the defendant was dressed?

A. Yes, yes.

Q. And how long after you had this conversation with Mr. Blum did you take the defendant from the station down to the hospital? A. Shortly after seven.

Q. Well, how long in minutes approximately after this conversation did you leave the station with the defendant?

A. Well, we brought him upstairs. About ten or fifteen minutes.

Mr. Facelle: I have no further questions.

*Cross Examination by Mr. Rosenberger:*

Q. Did you make any notes of anything that happened that day? A. Do I have any notes?

Q. Yes. A. No.

Q. None? A. No.

Q. You remember that you told Mr. Blum that you were going to take Mr. Hawkins to the hospital, right?

A. Yeah.

Q. You said that Mr. Blum asked you if Mrs. Hawkins could get a shirt, get some clothes for Mr. Hawkins? A. Yes.

Q. Now, you testified here just recently in another Hearing, didn't you? A. That's correct.

Q. Do you know whether Mr. Hawkins ever got a shirt before the time that Mr. Blum asked you about his wife getting clothes for him? A. Had he ever got a shirt?

Q. Yeah. A. I don't recall.

Q. Excuse me? A. I don't recall him having a shirt, no.

Q. You don't recall whether he got one? A. He got—

Q. Did you ever see him wear a shirt besides what his wife brought when she went home to bring the clothes?

A. No.

*Frank Conover, for People, Cross*

Q. Is that correct? A. Yes, sir.

Q. Where did you bring Mr. Hawkins when you brought him to Mr. Gagliardi? A. I brought him to the foot, to the right of the foot of the bed. Now, if you are looking to the foot of the bed, it would be to the left at the foot of Mr. Gagliardi's bed.

Q. And where were Mr. Simbari and Mr. LaMontagne? A. On either side of Mr. Hawkins.

Q. And did Mr. Gagliardi say anything to you? A. As to identifying Mr. Hawkins?

Q. Did he say anything to you at all, sir? A. He nodded his head to me and squeezed my hand. I was holding his hand at the time.

Q. He nodded his head and squeezed your hand? A. In response to my questions.

Q. Did he speak any words? A. No, sir, he did not.

Q. Now, you had spoken to him earlier in the day, had you not? A. Yes, sir.

Q. And I believe in another proceeding you told us that if he placed his fingers at his throat he was able to speak? A. Yes, sir.

Q. But he nodded his head? A. Yes, sir.

Q. And squeezed your hand? A. That's right, sir.

Q. Now, have you given us all of the substance of your conversation that you had with him prior to the time that Mr. Hawkins was brought into the room? A. Yes, sir. Yes, sir.

Q. Did you inquire of the nurse whether Mr. Hawkins had had—Withdrawn.—Mr. Gagliardi had had any sedative that day? A. I didn't.

Q. That afternoon? A. That afternoon, no, sir. I did not.

Q. Did you inquire whether he had had any narcotic drug that afternoon? A. Not at that time, no, sir.

Q. Did you inquire prior to that time? A. Prior to the viewing?

*Summation by Mr. Facelle*

wallet, and why? Because he knew he had been a blood donor at Grasslands Hospital and that card had his blood type on it, and he knew he was going to need blood.

Is this the action and the thinking of a man who is not in full control of his senses?

Then he was in the ambulance, again trying to talk, wanting to say what happened. Then he was in the emergency room, wanting to talk, wanting to say what happened. He managed to scribble a note. You know the contents of the note. I don't have to repeat it.

And, ladies and gentlemen, would you condemn as Mr. Rosenberger would, Joe Gagliardi writing the word that he did? Is this a test of this man's character, because that is the word that he wrote after a man had cut his throat and dumped his body and had the woman he was with alone? Is this the test of his character, because he wrote the word that he wrote? Is this the standard by which we are going to measure the truthfulness of Joseph Gagliardi? Would he have been more truthful if he had written "Negro knife"?

Then he went up to the operating room. You heard the doctor's testimony, a seven to eight inch gash in his neck, seven to eight inches long; so deep that it exposed the back wall of his throat.

What can we say about Dr. Ivker or Dr. Antonowich? Perhaps all that could be said was said when Joe Gagliardi opened his eyes and lived. He lived. Had he not, we would not be here either.

But Joe Gagliardi still had that overwhelming drive to tell what happened, and when he came out of that operating room, what did he do? He called the nurse over and indicated to her, "I want you to write something down. It's important."

You heard the doctor testify and you heard the nurses testify. They were amazed, he was so alert, he was so lucid after what this man had been through. He was alert and lucid.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA ex rel.  
TIVIS TROIT HAWKINS, II :  
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Petitioner, :  
:  
v. : Pro Se 72 Civ 3090  
:  
HON. J. EDWIN LA VALLEE, : MEMORANDUM  
Superintendent, Clinton Cor-  
rectional Facility, :  
:  
Respondent. :  
-----X

GRIESA, J.

Petitioner, Tivis Troit Hawkins, II, applied to this Court for a petition of habeas corpus, alleging certain constitutional infirmities in the 1968 jury trial in County Court, Westchester County, which resulted in a conviction for murder, attempted murder, assault, and robbery -- all in the first degree. That application was denied by the undersigned in a Memorandum dated November 27, 1972, for the reasons therein stated.

Hawkins now moves for a certificate of probable cause for appeal, under 28 U.S.C. § 2253.

Hawkins' three claims of

tutional rights in the state proceedings were fully and fairly examined in the state courts. The facts relating to Hawkins' charges were treated thoroughly by the state courts. Also, there is no serious question as to whether the state courts applied the correct legal principles. Therefore the matter does not, in my view, call for further judicial analysis. In short, there is no "showing of federal questions adequate to deserve encouragement to proceed further." U.S. ex rel. Jones v. Richmond, 245 F.2d 234 (2d Cir. 1957), cert. den. 355 U.S. 846 (1957).

The allegation of bias and prejudice, made in the present motion, is entirely conclusory and patently frivolous in view of the careful consideration given to petitioner in the state court proceedings.

The motion is therefore denied.

So ordered.

Dated: New York, New York  
January 16, 1973



THOMAS P. GRIESA  
U.S.D.J.

UNITED STATES OF AMERICA ex rel.  
TIVIS TROTT HAWKINS, II

Petitioner,

v.

HON. J. EDWIN LA VALLEE,  
Superintendent, Clinton Cor-  
rectional Facility,

Respondent.

Pro Se 72 Civ. 3090

MEMORANDUM

-X

Petitioner Hawkins was tried and convicted in the County Court of Westchester County, New York, in 1968, after a jury trial, of murder in the first degree, attempted murder in the first degree, assault in the first degree, and robbery in the first degree. The Appellate Division, Second Department, of the New York Supreme Court affirmed without opinion, 35 A.D. 2d 654 (1970), and on October 27, 1970, Hawkins was denied leave to appeal to the New York Court of Appeals.

The petition for a writ of habeas corpus cites three grounds of alleged constitutional infirmity in his arrest and trial: (1) that the petitioner's confession was physically and psychologically coerced; (2) that the in-court identification of the petitioner by one of the victims, Joseph Gagliardi, was tainted by an unnecessarily suggestive

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that a shirt seized from the petitioner's home should not have been introduced into evidence at the trial, since the search which turned up the shirt was incidental to an arrest not based upon probable cause.

Judge P. Raymond Sirignano of the County Court of Westchester County held pre-trial evidentiary hearings on each of these issues in response to three motions made by petitioner -- (1) motion to suppress as evidence the alleged confession; (2) motion to suppress pre-trial identification of petitioner; and (3) motion to suppress certain items seized as evidence. In three thorough and comprehensive opinions, Judge Sirignano denied each of these motions (Record on Appeal in Appellate Division, Second Department, pp. 56-68, 299-306, 404-408).

Judge Sirignano found that the confession was voluntarily made after a knowing and intelligent waiver of petitioner's right to silence. At the time of the confession petitioner had not obtained counsel. Judge Sirignano found that there was a knowing and intelligent waiver of the right to counsel at the time of confession. Judge Sirignano's conclusions were stated as follows (Record on Appeal, pp. 67-68):

"From all of the credible evidence adduced at the hearing, the Court finds beyond a reasonable doubt:

Hawkins, II, was timely given the warnings as required by Miranda v. Arizona, (384 U.S. 436), namely:

(A) That the defendant was warned, prior to any questioning by the police, that he had the right to remain silent; and

(B) That anything he said could be used against him in a court of law; and

(C) That he had the right to the presence of any attorney; and

(D) That if he could not afford an attorney one would be appointed for him prior to any questioning, if he so desired.

(2) That the defendant understood his rights as a result of such warnings by the police.

(3) That the defendant knowingly and intelligently waived his right to remain silent and his right to retained or assigned counsel and voluntarily made certain oral and written statements to the police.

(4) That the defendant was not in any manner compelled or coerced into making such oral and written statements.

(5) That the defendant, soon after the making of such statements, had the assistance and advice of counsel.

(6) The Court, therefore, concludes that the oral and written statements made by the defendant to the police prior to his arraignment are admissible upon the trial of this indictment."

As to the issue regarding the pre-trial identification, it is useful to set forth the following facts.

the victims, Gagliardi, the only living person who could have testified directly as to the identity of the murderer. The showup was conducted at Gagliardi's bedside at Northern Westchester Hospital. A doctor testified at the pre-trial hearing that Gagliardi, prior to the showup, had undergone five and a half hours of surgery, had been in shock for an extensive period of time, and had lost about half of his blood. Gagliardi was taken to the recovery room for about an hour after the operation, and then was removed to the intensive care unit. The Judge found that Gagliardi was in such a condition that it was possible that he would not survive, and that it was therefore imperative that the police immediately bring the petitioner before the victim for possible identification.

Judge Sirignano also found that the petitioner was represented by an attorney prior to his being taken to the hospital, that the attorney was advised in advance of the intention of the police to take the petitioner to be viewed by Gagliardi at the hospital, and that the attorney did not at any time object to the proposed procedure. The Judge assumed that petitioner had a right to counsel as of the time of the identification under U.S. v. Wade, 388 U.S. 218 (1967), but held that under the above circumstances there was no denial of such right to counsel.

related to the question of whether the arrest of petitioner was without probable cause, resulting in the need to suppress evidence seized at the time of such arrest. At that hearing on that issue evidence was adduced as to the circumstances surrounding the arrest of petitioner through the testimony of two state police investigators. Gagliardi had provided the police with information as to the make, color and license number of a car seen by the victim a short distance away from the place where he and the other victim, Jeanette Steinke (later found dead), were abducted by petitioner. Gagliardi also supplied police with directions, by way of a map, to the place where petitioner took him and Miss Steinke. Gagliardi identified the abductor as a Negro male with a knife.

An auto registration check by the police revealed that petitioner was the owner of the vehicle described by Gagliardi. The police used Gagliardi's directions to locate the estate of Rabbi Maurice Eisendrath. On the grounds of the estate the police discovered the dead body of Miss Steinke. The police then went to the caretaker's house on the estate and saw the identified car through the garage door windows. A man in the caretaker's house, who identified himself as petitioner, was then arrested. Petitioner's house was searched shortly after the arrest.

that the police had reasonable cause to believe that the crime of murder had been committed and that the petitioner committed it.

Under 28 U.S.C. § 2254(d) the above determinations of the State court are presumed to be correct. The only exceptions to such presumption occur when it appears that there are certain infirmities in the State court proceeding such as failure to afford a fair hearing, etc.

In the present case neither the petition, nor the reply to the State's answer, even suggests any of the infirmities necessary to overcome the presumption of correctness that exists with respect to Judge Sirignano's determinations. Petitioner's pleadings are of the most conclusory nature and merely re-argue points made in the State proceedings.

The State court held full hearings with regard to the factual issues involved in this petition, and made comprehensive and reliable findings based upon such hearings. There is no occasion for any evidentiary hearing in this court. Townsend v. Sain, 372 U.S. 293, 312-13, 318 (1963). Moreover, there is no indication of any error of law committed by the State court which would indicate that the petition in this court should be granted.

As to the claim of involuntary confession the State court applied the proper legal standards and found the confession to have been voluntary and not coerced. On the issue of the pre-trial identification, there are two legal issues. The first is whether the identification violated constitutional rights because it was a one-man showup, rather than the usual police station lineup. The State court was justified in holding that an immediate hospital confrontation between Gagliardi and petitioner was imperative, in accordance with Stovall v. Denno, 388 U.S. 293 (1967), cited by the State court. The next issue about the identification relates to the claim that at the time of such identification petitioner's right to counsel was violated. As already noted the State court assumed that petitioner had a right to counsel as of the time of the identification, under U.S. v. Wade, 388 U.S. 218 (1967). The State court further held that there was no violation of this right. Petitioner did not have an attorney with him at the showup but this was simply because petitioner's attorney did not choose to go to the showup. It should be noted further that since the time of the State court's decision on petitioner's motion with respect to the identification the Supreme Court has handed down a decision further defining the rule in Wade. This is the decision in Kirby v. Illinois, 406 U.S. 682 (1972). The latter decision holds that the right to counsel under

the Sixth and Fourteenth Amendments attaches only "at or after the initiation of adversary judicial criminal proceedings -- whether by way of formal charge, preliminary hearing, indictment, information or arraignment." 406 U.S. at 689. In the present case the showup occurred at a time before there had been any proceeding initiated of the type referred to by the Supreme Court in Kirby. See also U.S. ex rel. Robinson v. Zelker, \_\_\_\_\_ F.2d \_\_\_\_\_ (2d Cir. Sept. 28, 1972).

As to the validity of the arrest, there was clearly probable cause for such arrest under the facts as found by the State court. For a recent treatment in this Circuit, see Raffone v. Adams, \_\_\_\_\_ F.2d \_\_\_\_\_ (2d Cir. Sept. 19, 1972).

Although petitioner has not raised this particular issue, there is a question as to whether the search of petitioner's home was a search of proper scope incidental to the arrest. In Chimel v. California, 395 U.S. 752 (1969) the Supreme Court held a search without a search warrant made incidental to an arrest, is generally only valid on the accused's person or in his immediate physical area. See 395 U.S. at 768. However, the Chimel ruling is not retroactive. Williams v. U.S., 401 U.S. 646 (1971). Under the pre-Chimel decisions the arrested person's dwelling could be validly searched as

an incident to an arrest. U.S. v. Rabinowitz, 339 U.S.  
56 (1950); Harris v. U.S. 331 U.S. 145 (1947).

PB  
Petitioner's application for a writ of habeas  
corpus is hereby ~~denied~~ *dismissed*.

So ordered.

Dated: New York, New York  
November 27, 1972

*Thomas P. Griesa*  
THOMAS P. GRIESA  
U.S.D.J.

*Colloquy*

that was approximately a half hour after he was taken into custody. Within three hours of that time or approximately three hours of that time, he was taken before the victim, the only person who could possibly exonerate this defendant. I think certainly there is no question in the Court's mind that the victim in this case not having been released from the hospital to July 29th, some thirteen days later, certainly at that time was in no position to go down to the Police Station as was pointed out in the Stovall decision, nor to participate and be present at any lineup. That is assuming, Your Honor, further that it was possible at that time to get, and it's just not a question as counsel would state so simply, of having a Negro there or other Negroes. We must further refine it. There must be other Negroes of the approximate age of the defendant, other Negroes of the approximate height of the defendant, other Negroes of the approximate weight of the defendant, other Negroes of the approximate attire of the defendant. And this counsel would have the Court believe what is possible under the circumstances existing in this case with the condition of the victim of being as it was. We respectfully submit, Your Honor, that under the circumstances and the totality of the circumstances surrounding the confrontation if you will in this case, it was not only not unreasonable of the police officers but again to quote the language of Stovall, it was imperative.

Mr. Rosenberger: If I may, one further?

The Court: Yes.

Mr. Rosenberger: Mr. Facelle says that it may not have been possible to get people who in anyway resembled the defendant. Your Honor, we will never know whether it's possible or not, simply because the officer said he didn't even try. He made no attempt. He didn't even reach the question of tall or short, fat or thin, old or young, work clothes or dinner clothes. He just didn't

*Joseph M. Gagliardi, Jr., for People, Direct*

Q. And then you said he removed your belt? A. Yes, sir.

Q. What did he do with your belt? A. He tied my feet to the pole with it.

Q. Then what happened? A. He went back upstairs.

Q. Now, while this time was going on in the cellar, did you get another look at the man? A. I got a glance at him, that was all.

Q. What happened after you were tied? A. He went upstairs. I didn't hear nothing for a while, just silence. And then he come back downstairs.

Q. Approximately how long was he gone before he came back down? A. Three or four minutes, no more than that.

Q. Did he come back down through the cellar steps? A. Yes, sir.

Q. And what happened as he was coming down the cellar steps? A. I looked over my shoulder and I got another glance at him.

Q. And when he arrived down in the cellar, what happened? A. He placed a plastic bag of some sort over my head. It was just laying on there.

Q. I'm sorry, I didn't hear you. A. It was just hanging on my head.

Q. Was it hanging tightly or loosely? A. Loosely.

Q. Then what happened? A. I was trying to look around to see what was going on, and I couldn't see out straight, so I was looking down, and when I looked down I saw a knife down about here (indicating).

The Court: Indicating in the chest area.

Q. Did you see what kind of a knife it was, Joe? A. It was a wooden handle, steak knife like would be on the table for dinner or something.

Q. And you saw this knife, and then what happened. A. He then cut my throat.

*Colloquy*

had knowledge of his departure and where he was going and for what purpose by his own testimony. He further testified, Your Honor, that he knew that Northern Westchester Hospital was approximately fifteen miles distant, that the trip will take approximately in his opinion fifteen to twenty minutes to get there. He testified that with this knowledge of where the defendant was going and for what purpose he did not desire to or make any attempt to have a desk officer apprise the officers by car radio, call on the telephone to the hospital and say hold up this identification until I get there. I want to be present. Don't bring the defendant in until I get there. Did he tell the desk officer or anyone for that matter? And he knew they were ranking officers there to wait because I will proceed down to participate if I deem necessary. No such attempt was made. He said he went back and continued making telephone calls. We respectfully submit, Your Honor, that we have no know way of knowing what Mr. Blum's motivation was. We can speculate, for example, that the defendant has said he was innocent, didn't commit this crime, and in fact had an alibi, was not there. Maybe Mr. Blum, Your Honor, wanted this defendant to be viewed by the victim because maybe Mr. Blum felt that my victim or my defendant, my client is innocent. And I want him viewed by this victim because this victim is the only one who can observe and exonerate him. Let's have that done before he is arraigned. Why go through all of this. We have no way of probing the mind of Mr. Blum. But should we? Counsel is proceeding via this Hearing on an application which as we said, we presume is predicated on the Wayde and Gilbert decision of the United States Supreme Court and the decision of Stovall against Denno. We respectfully submit to the court, and

*Argument by Mr. Facelle*

safeguards, including the necessary warnings provided. Your Honor has heard the testimony of the defendant and his witnesses. We won't go into that department. We'll ask Your Honor to consider that testimony that I will point up to Your Honor, those factors in the People's witnesses' testimony which do not lend weight to this being a voluntary statement.

The Court: Thank you, Mr. Rosenberger. Mr. Facelle.

Mr. Facelle: If Your Honor please, I won't belabor the court with the testimony which is recent and certainly fresh in the court's mind. I think, however, there are certain points to which counsel alluded and to which I would like to make reference. I think starting with the attire of the defendant, it is quite clear from the testimony of the defendant's wife that at the time that he responded to the inquiry of the police officer he was sleeping and that he was naked, and that it is the defendant who slipped on a pair of trousers to respond to this inquiry. And he was placed into custody in that manner. It was not the police who dictated his manner or motive of attire. It was the defendant. What bearing this has as perhaps to the psychological coercion, if that is what counsel perhaps is implying, I think is minimum. I respectfully submit, Your Honor, that I think perhaps just to clarify the record although the statements are marked in evidence. The statement designated as to the time in the upper right hand corner as four-thirty p.m., and I believe the testimony of the officer was that this was the time that the statement was commenced, not the time that it was completed. Now we heard the testimony, Your Honor, of two officers who stated as to the advices and admonitions they gave to this defendant. Following that their testimony was that the defendant dictated in his words what had transpired. I respectfully submit that certainly even the more casual perusal of this or these

with the distance between his home and Dr. Eisendrath's, a third or so of a mile (Appellant's Brief, pp. 31-32, 33 fn., 36) might suggest a certain confusion about what was searched. That presents no problem, though, because the appellant was arrested in the doorway leading to his living room, and the living room was searched. The problem here, if there is a problem, is not *what* was searched but *when* it was searched, and none of the cases upon which the appellant relies addresses itself to that question. They all deal with the what of the matter and for that reason must be disregarded.

**C. The failure to secure a search warrant has no effect on this case**

Without fully intending to do so, we have presented all of our arguments for this sub-point in sub-points A and B. As we attempted to indicate there, the arrest was amply authorized by the facts then known to the State Police, and, being authorized to arrest the appellant, they were authorized to conduct a search incidental to that arrest so long as it was confined to "the area from within which he might have obtained . . . something that could have been used as evidence against him." *Chimel v. California*, *supra*, 23 L. Ed. 2d at 697. In this case that *Chimel* rule was clearly followed.

Despite the appellant's argument that the fact that the police had not secured a search warrant renders the search invalid, we would still urge upon the Court that *Chimel* holds no such thing. As a matter of fact, in his dissenting opinion in that case, Mr. Justice White specifically pointed out that fact, 23 L. Ed. 2d at 700. This view concurs with that of this Court in *People v. Brosnan*, *supra*. Consequently, it is submitted, there is no impropriety on the part of the police in not having secured a search warrant.

*Decision and Opinion by Sirignano, J., Denying Motion to  
Suppress Certain Items Seized as Evidence*

him as to where he had been when first accosted and where he had last seen the Steinke girl. That Gagliardi did not give him the name of his assailant and that he (Conover) had not spoken to anyone who saw the commission of the murder. The name of the owner of the vehicle which was described by Gagliardi was determined from a motor vehicle registration check. Gagliardi had told him that he had seen the red Mustang at the place where he was accosted. He described it and gave its license number to him. Gagliardi did not say who was driving the red Mustang automobile; but he did say that it was parked at the place he described.

Upon the testimony adduced at this hearing the Court finds that the police had reasonable cause to believe that the crime of murder had been committed and that the defendant had committed such crime. Under these circumstances, the arrest of the defendant was lawful and the search was reasonable as incidental to the said valid arrest. The Court concludes that the evidence seized should not be suppressed.

Submit order.

Dated: White Plains, N. Y.  
March 19, 1968

P. RAYMOND SIRIGNANO  
County Court Judge

HON. CARL VERGARI  
District Attorney

of the car, and if it is also reasonable to infer, as the Court of Appeals assures us it is, that the owner parked it where it was observed, then the pedestrian and the appellant must be one and the same man. This logic alone could permit the police to arrest the appellant, but when to it is added the fact that he is a Negro and this crime was committed by a Negro, their right to do so becomes irrefutable.

The Court is also respectfully reminded that in terms of the Code of Criminal Procedure, § 177(4), it is not necessary in order to make a valid arrest that the police *know* that a defendant has committed a felony; it is enough if they have reasonable cause for *believing* he has done so, and it is submitted that this case is replete with facts to justify such a belief.

**B. The search was incidental to the arrest**

Before launching into a torrent of argument in defense of the point of view we urge on the Court, it would probably be in order to state calmly just what it is we're dealing with here: a shirt, that's all, a shirt that was draped on the living room couch. Furthermore, it was not seized as we ordinarily think of seizure; it was given to Investigator Conover by Mrs. Hawkins (550). Neither was it a search as we customarily conceive of searches, because it was in the plainest of plain view. Inasmuch, therefore, as the appellant perceived no advantage from securing the testimony of Mrs. Hawkins at the suppression hearing, a substantial argument could be made that this was a consensual search, and it is an argument we urge upon the Court.

If, conversely, we are called upon to defend this search as one incidental to the arrest, we do so with no less confidence than that with which we expressed the thought that it was conducted by consent. It seems to us, though, that we must direct our argument to two distinct questions. At the end they coalesce, but they must nonetheless be treated separately at the outset. The first concerns the area which

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Pro-Se

Jury demand date:

Form No. 106 Rev.

TITLE OF CASE

ATTORNEYS

TIVIS TROIT HAWKINS, II

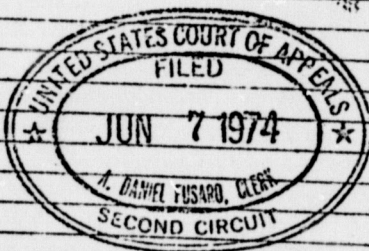
VS

HON. J.E. LA VALLE, Superintendent  
of Clinton Correctional Facility

For plaintiff: Pro-Se

Tivis Troit Hawkins II No. 43437  
Clinton Correctional Facility  
Dannemora, New York

For defendant:



STATISTICAL RECORD		COSTS	DATE	NAME OR RECEIPT NO.	REC.	DISB.
mailed		Clerk				
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rit of Habeas Corpus		Witness fees				



SUPREME COURT OF THE STATE OF NEW YORK  
XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

-----X  
In the Matter of  
UNITED STATES OF AMERICA ex rel.  
TIVIS TROIT HAWKINS, II,  
Relator-Appellant,

-against-

J. EDWIN LAVALLEE, Superintendent,

Respondent-Appellee.

:  
:  
: AFFIRMATION OF SERVICE

: Docket No. 74-1717  
:  
:

----- X  
The undersigned attorney, duly admitted to practice in the courts of the State of New York, affirms the following to be true pursuant to CPLR 2106, under the penalties of perjury:

1. That he is a member of ~~associated with~~ the firm of ZANE and ZANE, attorneys for the Relator-Appellant.

2. That on the 5th day of August, 19 74, your affirmant served the within Brief for Relator-Appellant.

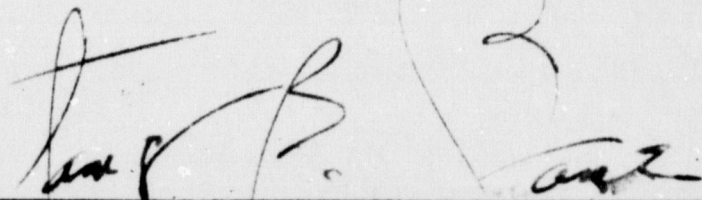
upon LOUIS J. LEFKOWITZ, Attorney General,

attorney(s) for Respondent-Appellee,

at Two World Trade Center, New York, New York

the address(es) designated by said attorney(s) for that purpose by depositing a true copy of same to each attorney enclosed in a post paid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Dated: August 5, 1974.  
New York, New York.

  
\_\_\_\_\_  
JAMES B. ZANE